



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRC NO. 15 OF 2017

FORMERLY ELD HCCRC NO. 36 OF 2013

REPUBLIC.....PROSECUTION

VERSUS

KUKAT KITILIT.....ACCUSED

JUDGMENT

[1] The Accused who was originally charged with murder contrary to section 203 as read with 204 of the Penal Code later pleaded guilty to manslaughter upon a plea bargain agreement, the factual basis of which as urged by the DPP and accepted by the Court was that lack of intention to kill. The accused was examined by a Psychiatrist and certified fit to plead dated 5/2/2018. The Court was satisfied upon examination on oath of the accused that he had voluntarily entered into the plea bargain agreement reducing the charge from murder to manslaughter and his intention to plead guilty to the reduced charge.

[2] The facts of the case as set out by the Prosecution and accepted by the accused were that:

Facts

The accused and the deceased in this matter are Father and child. The accused and his wife had been married for seven years and were blessed with three children. The deceased who was their last born was aged one and a half years. Their seven years of marriage was with a lot of difficulties and domestic problems. On the 17th day of March 2013, the accused and his wife went on a drinking spree and when they came back they disagreed and started fighting. The accused took a walking stick and started beating his wife who was carrying the deceased on her back. The wife of the accused then placed the child on the bed. As they continued fighting, the accused mistakenly hit the deceased on the head as it was dark and she died instantly. The wife of the deceased ran away with the elder child, leaving the deceased and the other child in the house. The accused on realizing the child was dead raised alarm which attracted his neighbours. His neighbours reported the matter to the assistant chief who visited the scene and confirmed that the child was dead. The accused was arrested and taken to Loruk police station and then to court where he was charged with murder which has now been reduced to manslaughter. Police officers visited the scene and removed the body to Kabarnet referral hospital mortuary postmortem on the body of the deceased was conducted on 11th of April 2013 and the doctor formed an opinion that the cause of death was severe head injury secondary to blunt force trauma to the head. The accused person was thereafter presented before the doctor at Moi Teaching and Referral hospital for mental assessment who confirmed he was mentally fit to stand trial.”

[3] The Probation Officer’s Pre-sentencing Report was positive for probation sentence as follows:

“CONCLUSION

Your lordship, the accused before this honourable court has had an acrimonious marital conflict with his wife for a long time. The feud took a new twist on the material date when he shifted his anger on the child and killed her when the wife fled from the matrimonial home to escape his wrath. The neighbourhood described the whole episode as unfortunate and attributed the accused’s harsh temperament and his over-indulgence in alcoholism as the genesis of all the trouble.

The deceased’s mother on her part seems to have come to terms with the loss. She is quite satisfied with the fact that the accused has been subjected to the due process of law and has no objection if he is granted a supervised community – based sentence. She is however of the opinion that the accused ought to be forewarned not to interfere with her newfound marriage since she is currently living with another man within the neighbourhood.

The local administration expressed reservation over the accused past conduct describing him as a person who is difficult to manage having been a subject of ADR mechanism from sometime with no sign of reform. They are however of the view that in case he is granted a community – based sentence, he needs to be closely monitored to ensure that he abides by the conditions of the order.

RECOMMENDATION

Given the accused's remorsefulness and the positive sentiments from the deceased's mother who is the most aggrieved party, it is our opinion that he may be granted a supervised community-based sentence preferably probation sentence to facilitate his further reconciliation with his wife, the immediate family members and the neighbours.

Kiprono M.K.

Probation Officer

Baringo Sub County

Date: 25/07/2018”

Conviction

[4] The court accepted the accused's plea of guilty to the charge of manslaughter which was put to him and explained in Pokot language which he professed to understand and after confirming his acceptance of the facts as set out by the Prosecution, and, accordingly, convicted him for the offence of manslaughter contrary to section 202 as read with 205 of the Penal Code.

Sentence

[5] In mitigation, counsel for the accused, Mr. Chepkilot, urged as follows:

“The accused is a young man of productive age. He is 34 years. He was 28 years at the time of his arrest. He is remorseful. Having been in custody for 5 years now the accused has had time to reflect on the pain of losing a daughter. The accused states that it was not intentional and he regrets to date. He requests for a non-custodial sentence to go and start life afresh and take care of his children.”

[6] On the principle that same offences should attract similar penalties, this court recalls that it has in previous similar cases of manslaughter passed a sentence of imprisonment for periods ranging between **3 years to 8 years** depending on the circumstances of the cases, the moral blame-worthiness of the accused and attendant factors including presence of extreme provocation, use of excessive force and whether the accused was the aggressor or merely acting in self defence. See **Omuse v. R** (2009) KLR 214, **R v. Gilbert Kipkorir Koech**, KBT. HCCRC No. 58 of 2017 and **R. v. Margaret Kabon Talaa & 2 Ors.** KBT HCCRC No. 18 of 2017.

[7] The accused has been in custody since 21st March 2013 when he was remanded to await his trial upon the murder charge dated 21st March 2013. He has therefore been in custody for 5 years and 4 months. Section 333 (2) Proviso of the Criminal Procedure Code requires the sentencing court to consider the period of pre-trial detention when passing a sentence of imprisonment, as follows:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

[Act No. 7 of 2007, Sch.]”

[8] With the period of 64 months (5 years 4 months) that he has already spent in custody, the accused would with 1/3 remission under section 46 of the prisons Act have served a sentence of $(64 \times 3/2 = 96 \text{ months})$ **8 years. So that even if the court sentences the accused to serve imprisonment for 8 years, it would have to order that he be released from custody forthwith as he would have served the sentence in full with remission.**

[9] I have considered that the sentence of probation recommended by the Probation Officer's report would be an additional punishment to the period 8 years with remission already served by way of pre-trial detention and I, consequently, decline to impose the probation order.

[10] I have noted the circumstances of the offence where the accused's blameworthiness may have been diminished by alcoholic drink but as I have stated in previous numerous cases, the drink-driven killings are rampant in this region and appropriate deterrent sentences are necessary. A custodial sentence is the appropriate sentence.

ORDERS

[11] For the reasons set out above, having convicted the accused on his own plea of guilty to the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, and having considered the facts of the case, sentence the accused to an imprisonment for a

term of 8 years to be reckoned in terms of the Proviso to section 333 of the Criminal Procedure Code, from the date of his remand upon arraignment on 21st March 2013.

[12] As the accused has already served the term of the sentence with remission in full, and the court has no reason to find that remission would have been denied, the court therefore directs that the accused shall be released from custody forthwith unless he is otherwise lawfully held.

DATED AND DELIVERED THIS 26TH DAY OF JULY 2018.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chepkilot for the Accused Person

Ms. Macharia, for the DPP